United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7534

ORIGINAL

To be argued by
BURTON S. COOPER

United States Court of Appeals
FOR THE SECOND CIRCUIT

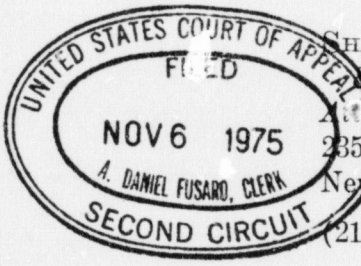
LORRAINE BERMAN,
Plaintiff-Appellant.

against

CARL A. VERGARI, District Attorney of Westchester County,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT



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Preliminary Statement

This is an appeal from two orders of the United States District Court for the Southern District of New York (Ward, J.), one of which granted appellee's motion to dismiss appellant's complaint seeking to permanently enjoin appellee from proceeding with a New York State criminal prosecution, and the other of which denied appellant's motion for a preliminary injunction staying such prosecution.

The Facts

On August 15, 1974, the appellant, a woman, was indicted by an all-male grand jury impanelled pursuant to § 665(7) of the New York Judiciary Law, which section permitted women automatic exemptions from jury duty.[1] On January 21, 1975, the United States Supreme Court in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), reversed that plaintiff's conviction and declared unconstitutional, a Louisiana statute excluding women as a class from jury duty, and stated that "it is no longer tenable to hold that women as a class may be . . . given automatic exemptions . . ." 419 U.S. at 537.[2] Three weeks after the decision in *Taylor*, the Governor of the State of New York, in approving the Bill repealing § 665(7) of the Judiciary Law, stated:

> While there are some minor differences between the Louisiana statute and the New York women's exemp-

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[1] Section 665 of the New York State Judiciary Law, in effect at the time of appellant's indictment, stated:

> Each of the following persons only, any inconsistent provision of law to the contrary notwithstanding, although qualified, is entitled to exemption from service as a juror upon claiming exemption therefrom:
>
> . . .
>
> 7. A woman.

The percentage of women serving on petit juries in Westchester County has always been materially unrepresentative. Moreover, the percentage of women serving on grand juries is even lower. Of the forty-six persons sitting on the two grand juries in existence in Westchester County at the time of appellant's indictment, only one was a woman. There were no women on the grand jury which indicted appellant. The sexual composition of the grand and petit juries sitting in 1974 in Westchester County is set forth at pp. 11a-12a.

[2] The principles that apply to the systematic exclusion of potential jurors are, of course, essentially the same for grand and petit juries. *Alexander* v. *Louisiana*, 405 U.S. 625, 626 (N. 3) (1972); *Pierre* v. *Louisiana*, 306 U.S. 354 (1939).

> tion they are basically similar and there is virtually no doubt that the provisions of the Judiciary Law repealed by the bill will eventually be declared unconstitutional under the *Taylor* decision.

Ironically for the appellant herein, the Governor in his message continued:

> The repeal of the women's exemption will permit the courts to begin the immediate impanelling of juries in conformity with the *Taylor* case, without having to wait for a decision by the New York State Court of Appeals officially declaring the women's exemption unconstitutional.

McKinney's Session Law News March 25, 1975, No. 1, p. A-71.

Section 665(7) of the Judiciary Law was repealed by Chap. 4 Laws of 1975.

Notwithstanding the unconstitutionality of the statute by which she was indicted, appellant's motion in Westchester County Court to dismiss the indictment based on *Taylor* was denied (5a, 7a, 14a-17a). Under the rule enunciated in *Taylor*, if the appellant is convicted, that conviction must be reversed. However, § 450.10 of the New York Criminal Procedure Law does not permit a pre-conviction appeal from an order denying a motion to dismiss an indictment.

Having been irrevocably denied a State appellate forum in which to vindicate a fundamental constitutional right prior to trial, at which trial the collateral constitutional issue cannot be raised, appellant commenced this action to restrain the District Attorney of Westchester County from further prosecution.

Appellee, prior to answering, moved to dismiss the complaint. The affidavit in support of his motion did not controvert any of the allegations of the complaint, and stated only that "plaintiff makes no meaningful factual

allegations that the State prosecution was undertaken in bad faith. . . ." (27a)

The appellee in his motion papers did not challenge appellant's claim that the New York Judiciary Law under which appellant was indicted is unconstitutional. The District Court did not address itself to the propriety of a State Court prosecution continued in the face of an admittedly unconstitutional indictment. Instead, it dismissed the complaint upon the authority of *Younger* v. *Harris,* 401 U.S. 37 (1971) and *Mitchum* v. *Foster,* 407 U.S. 225 (1972), because the appellant "had failed to establish the irreparable injury or bad faith which *alone* would justify enjoining a state criminal proceeding" (29a) [emphasis added]. Thereby, ignored the most critical test of these opinions justifying the issuance of an injunction: that the Constitution had been patently and flagrantly violated.

Shortly after deciding *Taylor,* the United States Supreme Court, in *Daniel* v. *Louisiana,* 420 U.S. 31 (1975), held that *Taylor* had no retroactive application to those cases in which there had already been convictions. The rationale behind *Daniel* was the necessity of avoiding numerous retrials (420 U.S. at 33). Since appellant has not yet been tried, much less convicted, *Daniel* imposes no restraint upon the Court in its application of the *Taylor* principle to the case at bar. On the contrary, implicit in *Daniel* is the mandate that where there has been no conviction, the principle of *Taylor* must be applied.

Question Presented

Should a Federal Court intervene to enjoin a State Court criminal prosecution based upon an indictment secured by virtue of an admittedly unconstitutional state statute.

The Federal Courts should intervene to enjoin a State prosecution pursuant to an unconstitutional indictment.

In *Mitchum* v. *Foster, supra,* the Supreme Court refined the doctrine of *Younger* v. *Harris, supra,* and established the criteria for Federal intervention in the granting of equitable relief. A State prosecution will be enjoined

> [1] where irreparable injury is "both great and immediate" . . . [2] where the state law is "'flagrantly and patently violative of express constitutional prohibitions,'" . . . or [3] where there is a showing of "bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief."

407 U.S. at 230. At the time that Federal intervention was sought, in *Younger* and *Mitchum,* the constitutional infirmity of the challenged statutes in those cases had not yet been adjudicated. Here, however, by virtue of *Taylor,* the unconstitutionality of § 665(7) of the Judiciary Law has been adjudicated. The Governor conceded it, the legislature repealed it; and the appellee has admitted it.

All but one of the *Mitchum* criteria justifying Federal intervention require factual findings and are discretionary. One, however, is constitutionally obligatory: "when State law is flagrantly and patently violative of express constitutional prohibitions" which criterion is nothing more than an application of the Supremacy Clause of Article VI of the United States Constitution.[3] While it is true that a

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[3] In a recent application of the Supremacy Clause in circumstances similar to the case at bar, the Supreme Court, in *Sims* v. *Georgia,* 385 U.S. 538 (1967), held that *Jackson* v. *Denno,* 378 U.S. 368 (1964), applied to a State conviction. The Supreme Court of Georgia had affirmed the conviction and in a manner reminiscent of what New York courts have done concerning *Taylor,*

(*footnote continued on following page*)

Federal Court is reluctant to interfere with State criminal proceedings because of both statutory restraints and comity, ". . . the sharp edge of the Supremacy Clause cuts across all such generalizations." *United States* v. *McLeod*, 385 F.2d 734, 745 (5th Cir. 1967). See also *Duke* v. *Texas*, 327 F.Supp. 1218, 1239 (E.D. Tex. 1971), *cert. denied*, 415 U.S. 978 (1974).

Appellant's right to Federal intervention at this time is based upon the patent unconstitutionality of her indictment, not the unconstitutionality of the underlying criminal statutes.

Certainly, appellant should not be compelled to vindicate her constitutional rights by being subjected to a State Court trial at which the constitutional issue can no longer be raised, and, if convicted, by appealing to State Courts, and then, if all else fails, by appealing to the United States Supreme Court. Her rights are already defined. Her constitutional guarantees have already been violated and "the very pendency of the prosecution entails the deprivation of a Federal right—the right to pursue in a lawful manner the freedom guaranteed by the Constitution without being required as a pre-condition to defend against an illegitimate criminal charge". *Perkins* v. *Mississippi*, 455 F.2d 7, 35 (5th Cir.), *aff'd on rehearing*, 470 F.2d 1371 (5th Cir. 1972) (en banc).

The complaint should not have been dismissed where the admitted facts entitled appellant to the requested relief.

(footnote continued from preceding page)

attempted to distinguish its confession rules from those condemned in *Jackson*. In reversing the conviction, the United States Supreme Court stated: "Jackson, having been decided June 22, 1964, was binding on the courts of Georgia in this case, it having been tried October 7, 1964. Such rule is, as we have said, a constitutional rule binding upon the States and, under the Supremacy Clause of Article VI of the Constitution, it must be obeyed." 385 U.S. at 544.

Escalera v. *New York City Housing Authority*, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970); *Handschu* v. *Special Services Division*, 349 F. Supp. 755 (S.D.N.Y. 1972).

CONCLUSION

The Orders below should be reversed and the Court below should be directed to issue a preliminary injunction.

Respectfully submitted,

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Attorneys for Plaintiff-Appellant

Of Counsel:
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DOUGLAS A. COOPER

75-7534

376—Affidavit of Service by Mail — The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

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Lorraine Berman
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Defendant-Appellee

State of New York, County of New York, ss.:

Raymond J. Braddick, agent for Burton S. Cooper Esq., being duly sworn deposes and says that he is the attorney for the above named Plaintiff-Appellant herein. That he is over 21 years of age, is not a party to the action and resides at 8 Mill Lane Levittown, New York

That on the 6th. day of November, 1975, he served the within

Brief for Plaintiff-Appellant

upon the attorneys for the parties and at the addresses as specified below

Carl A. Vergari Esq.
District Attorney, Westchester County
Attorney for Defendant-Appellee
111 Grove Street

by depositing 3 true copies
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 6th. day of November, 1975

Roland W. Johnson

Raymond J. Braddick

ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977